

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 3331

IN THE MATTER OF:

Served May 10, 1989

Application of RICHARD W. BUTLER,)
JR., Trading as RWB TOURS for a)
Certificate of Public Convenience)
and Necessity)

Case No. AP-88-52

By application filed November 14, 1988, Richard W. Butler, Jr., trading as RWB Tours (applicant) seeks a certificate of public convenience and necessity to transport passengers, together with mail, express, and baggage in the same vehicle as passengers, in special operations between Mount Vernon and Arlington National Cemetery, VA, and points in that part of the District of Columbia south of a line beginning at the junction of Constitution Avenue, N.W., and Rock Creek Parkway, N.W., thence along Constitution Avenue, N.W., to 17th Street, N.W., thence along 17th Street, N.W., to Pennsylvania Avenue, N.W., thence along Pennsylvania Avenue, N.W., to 10th Street, N.W., thence along 10th Street, N.W., to F Street, N.W., thence along F Street, N.W., to 9th Street, N.W., thence along 9th Street, N.W., to Pennsylvania Avenue, N.W., thence along Pennsylvania Avenue, N.W., to Constitution Avenue, N.W., thence along Constitution Avenue, N.W., to its junction with 2nd Street, N.E., restricted to lectured, round-trip sightseeing tours and further restricted to the transportation of passengers in vehicles with a manufacturer's designed seating capacity of 15 persons or less (including the driver). 1/

Pursuant to Order No. 3272, served January 11, 1989, and incorporated herein by reference, a public hearing was held on February 15, 1989. Mr. Richard Butler, Jr., testified on his own behalf and presented two public witnesses. Mr. Major Lester Gorham and Mr. Jarlvis Earl Gorham trading as Scenic Sightseeing Tours (WMATC Carrier No. 92), Mr. Griffin M. Murphy trading as Maxi-Bus Tours (WMATC Carrier No. 93), Mr. Frank Lee (WMATC Carrier No. 113); Mr. Albert Strange trading as Albert Strange Limousine -- Maxi Van Service (WMATC Carrier No. 95), Mr. Arthur J. Thomas trading as Golden Eagle Sightseeing Tours (WMATC Carrier No. 88), Mr. Ernest Harrelson trading as Nation's Capital Sightseeing Tours (WMATC Carrier No. 86), and Mr. Samuel Howell trading as Samuel Howell Sightseeing Tours (WMATC Carrier No. 89) filed a joint protest on February 14, 1989, one day before the hearing and eight days after the deadline for filing protests. The Administrative Law Judge disallowed the protest due to

1/ To the extent this application could be interpreted to apply to operations solely within the Commonwealth of Virginia, it is hereby dismissed pursuant to the Compact, Title II, Article XII, Section 1(b).

its untimely filing and denied a subsequent oral motion to intervene pursuant to Commission Rule No. 16 for failure of the carriers to show good cause why the protest was untimely filed.

SUMMARY OF EVIDENCE

Mr. Richard Butler, Jr., currently works as a driver-lecturer for his father Richard Butler, Sr. Mr. Butler, Sr., holds WMATC Certificate No. 84 which authorizes transportation similar to that at issue in this application, the one difference being that Mr. Butler, Sr., is not authorized to perform transportation to Mount Vernon and Arlington National Cemetery in Virginia. Applicant previously worked in the same capacity for another WMATC carrier, Mr. Arthur Thomas.

Applicant plans to conduct operations using one 1988 15-passenger van which would be purchased from his father. Daily maintenance of the vehicle would include a check of the vehicle's lights, tires, brakes, oil, defroster, and windshield wipers. Major maintenance would be performed under a 70,000-mile warranty program that covers the vehicle. If a back-up vehicle is needed, applicant would rent or lease a substitute vehicle.

Applicant plans to offer two tours. His "Building Tour" would include visits to the White House, Lincoln Memorial, Vietnam Memorial, Ford's Theater, Capitol, and Bureau of Printing and Engraving with an optional visit to Arlington National Cemetery. The tour would take between three and four hours. The "Mount Vernon Tour" would include round-trip transportation between the Mall area and Mount Vernon. The tour would last between four and five hours. For the Building Tour, applicant proposes to charge \$12.50 for adults and \$10.50 for children ages 5 to 11. For the Mount Vernon Tour, applicant proposes to charge \$21 for adults and \$10.50 for children ages 5 to 11. Children under 5 would not be charged for either tour. Applicant would determine whether to offer customers the Building Tour or the Mount Vernon Tour by a majority vote of those persons wishing to take a tour. The individuals interested in taking the tour that is not selected would be referred to other WMATC-certificated carriers that offer the desired service. Applicant would offer service between 9 a.m. and 5 p.m. in the winter and between 9 a.m. and 8:30 p.m. in the summer.

Applicant submitted a balance sheet dated September 30, 1988, showing total assets of \$8,500 (\$500 cash and \$8,000 in undepreciated revenue equipment), no liabilities, and proprietor's equity of \$8,500. Mr. Butler, Jr., testified that his financial picture has changed since the preparation of the balance sheet with a major shift made in assets. The vehicle reflected on the balance sheet was involved in an accident and should no longer be represented as an asset. Applicant testified that he now has \$2,500 in cash, no additional assets, and no liabilities. Proprietor's equity is now represented as \$2,500. Mr. Butler, Jr., testified that, although he has pre-approved credit with Chrysler for the purchase of a van, his father will take the note

back, thereby eliminating the extension of credit from conventional sources. Applicant expects to generate \$20,000 in revenue and incur \$10,200 in expenses during the first year of operations. 2/

Mr. Butler, Jr., testified that his primary goal in obtaining a certificate of public convenience and necessity is to become his own boss and to provide security for himself and his family. The witness was concerned that periodic discord can erupt between family members and is of the opinion that having his own certificate would protect him from any such potential. He was unable to testify as to any benefit that the public would gain if the authority sought is granted. Applicant is familiar with the Compact and the Commission's rules and regulations and intends to comply with them.

Mr. Daniel J. Murphy testified in support of the application. Mr. Murphy has worked as a lobbyist for a trade association but at the time of the hearing was unemployed. Although the witness provided testimony regarding transportation needs of former employers, he was not authorized to appear on behalf of any business or employer. Mr. Murphy has made non-business referrals over the last year of up to 10 groups of family, friends, and associates for sightseeing services. The referrals were made mainly to applicant in his capacity as driver for his father, with some referrals being made directly to the father. Mr. Murphy expects to make a similar number of personal referrals in the future. The witness testified that he did not know if his referrals would be in actual need of the proposed service but opined that once an individual has taken a tour ". . . it's something they really like"

The second witness to testify in support of the application was Mr. Gus Koutsothodoros. Mr. Koutsothodoros is the owner/manager of the Lincoln House Restaurant which is located directly across from Ford's Theater in Washington, DC. The restaurant's clientele is a mixture of tourists, business people, and government workers. The tourists inquire about available sightseeing services on an average of twice a week with that number increasing during the summer months. The witness views the Butlers (Sr. and Jr.) as a team and has made frequent referrals to the operations of Richard Butler, Sr., either directly to Mr. Butler, Sr., or through applicant. Based on his satisfaction with service currently rendered by Richard Butler, Sr., the witness would be willing to make referrals to applicant if authority is awarded.

DISCUSSION AND CONCLUSIONS

In determining whether to grant a certificate of public convenience and necessity, we look to the standards enunciated at Title II, Article XII, Section 4(b) of the Compact which provides:

2/ Applicant testified at hearing that he no longer expects to incur an expense of \$2,000 for repairs and maintenance because the van that he would purchase will be covered by an extensive maintenance warranty, thus reducing expected expenses from \$12,200 to \$10,200.

. . . the Commission shall issue a certificate . . . if it finds, after hearing held upon reasonable notice, that the applicant is fit, willing and able to perform such transportation properly and to conform to the provisions of this Act and the rules, regulations, and requirements of the Commission thereunder, and that such transportation is or will be required by the public convenience and necessity; otherwise such application shall be denied.
(Emphasis supplied.)

Based on a review of the entire record in this case, we find that applicant has failed to sustain the burden of proof imposed by the Compact.

In determining whether an applicant has met its burden of proving that the public convenience and necessity require the proposed transportation, the Commission relies on the test enunciated in Pan-American Bus Line Operations (1 MCC 190, 203 [1936]). The Pan American test consists of three parts:

- (1) whether the new operation or service will serve a useful public purpose responsive to a public demand or need;
- (2) whether this purpose can and will be served as well by existing lines or carriers; and
- (3) whether it can be served by applicant with the new operations or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.

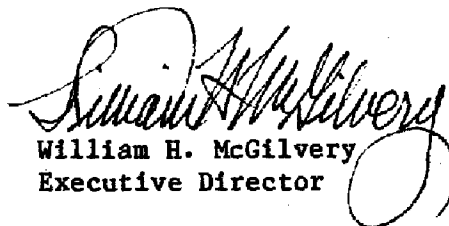
The application was supported by two public witnesses. The bulk of Mr. Murphy's testimony regarding prior business referrals could not be considered in the Commission's analysis of public need because the witness was not authorized to speak on behalf of any business or employer. His testimony was therefore examined in light of referrals that could be made in his capacity as an individual. Here, too, Mr. Murphy's testimony provided very little evidence of public demand or need. While the witness testified that there is a possibility that he may be able to make up to ten referrals to the applicant during the first year of the proposed operations, the witness was not certain that his personal referrals were actually in need of the proposed service. The second witness makes referrals for sightseeing service to applicant's current employer, Richard Butler, Sr. However, there was no evidence that would suggest that the service presently provided is inadequate or fails to meet Mr. Koutsothodoros' needs. The witness testified that he was pleased with the service currently being rendered and, most importantly, did not testify to a need for any additional service.

When asked by the Administrative Law Judge how the public would benefit from the fact that both applicant and his father would have similar certificates, Mr. Butler, Jr., testified that there would be "no difference" in terms of benefit to the public whether the authority sought was granted or denied. Mr. Butler, Jr., is a licensed sightseeing guide employed by an authorized carrier who would continue to ply his trade if the instant request is denied. Applicant's own testimony reveals that his primary goal in obtaining a certificate is not to provide a service where there is a proven public demand and need but to be his own boss and thereby gain job security.

Based on the evidence of record in this case, we find that Richard W. Butler, Jr., trading as RWB Tours has not met the requirement of proving that the proposed operation would serve a useful public purpose responsive to a public demand or need as set forth in the first part of the Pan American test. Having so found, we do not reach the issue of fitness. We note however, that applicant's minimal assets would have been a matter for discussion if the Commission had been called upon to make a determination of financial fitness.

THEREFORE, IT IS ORDERED that the application of Richard W. Butler, Jr., trading as RWB Tours for a certificate of public convenience and necessity is hereby denied in its entirety without prejudice.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS WORTHY, SCHIFTER, AND SHANNON:


William H. McGilvery
Executive Director